



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT BINET  
DEPUTY PRESIDENT GRAYSON**

**C2023/5566**

**s.604 - Appeal of decisions**

**Appeal by Burneikis  
(C2023/5566)**

**Sydney**

**2.00 PM, MONDAY, 13 NOVEMBER 2023**

**Continued from 10/11/2023**

PN1

VICE PRESIDENT ASBURY: Good afternoon, could we take the appearances please? For the appellant?

PN2

MR G PETRESKI: Mr Guy Petreski.

PN3

VICE PRESIDENT ASBURY: Thank you. And for the respondent?

PN4

MR B TYNAN-DAVEY: Mr Tynan-Davey.

PN5

VICE PRESIDENT ASBURY: Thank you. Are there any preliminary matters we need to deal with?

PN6

MR PETRESKI: Could you clarify what you mean to 'preliminary'?

PN7

VICE PRESIDENT ASBURY: Housekeeping, questions, process questions, before we start?

PN8

MR PETRESKI: No, not at this stage, no. No.

PN9

VICE PRESIDENT ASBURY: All right. As the appellant, are you ready to speak to your submissions and tell us why you say that permission to appeal should be granted and the appeal should be upheld?

PN10

MR PETRESKI: Yes, your Honour.

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VICE PRESIDENT ASBURY: Thank you.

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MR PETRESKI: Is that the proper terminology, your Honour?

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VICE PRESIDENT ASBURY: Vice President is fine.

PN14

MR PETRESKI: Vice President, okay, thank you. I'm not aware of these things.

PN15

VICE PRESIDENT ASBURY: That's all right.

PN16

MR PETRESKI: Vice President, we, over the weekend, after having conferred with you on Friday, we set about going through the paperwork in the appeals case and it's come to our attention that the respondent has been - is it possible to ask the respondent a question before we move any further?

PN17

VICE PRESIDENT ASBURY: Well, perhaps if you could give us an idea of what it's about.

PN18

MR PETRESKI: Sure. Okay, sure. We believe that the respondent has been using an external solicitor in this matter. In their submissions to us, in particular, outline of submissions. Outline of submissions by NGS Super, outline of reply submissions, even the F3 form for employer response on unfair dismissal, statements by Mr Jansen(?), supplementary statement by Mr Jansen, statements by Ms Melissa Adams, supplementary by Ms Melissa Adams and also in the respondent's outline of submissions.

PN19

We believe that by quick Google search, we had a look for, at the bottom of each page it has an ME reference number and it has a reference number underscore that we are not aware of at the time. So we did a quick Google search and found that ME is possibly Minter Ellison, lawyers.

PN20

VICE PRESIDENT ASBURY: And?

PN21

MR PETRESKI: Well, it was never made clear to us that they were going to use a lawyer. We never had the opportunity to use our own lawyer. We never had the opportunity - does that make sense?

PN22

VICE PRESIDENT ASBURY: Yes, but the respondent was not represented by an external lawyer in these proceedings. As I understand it, it was represented by internal counsel.

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MR TYNAN-DAVEY: Yes. That's correct, yes.

PN24

MR PETRESKI: Well, we looked through some recent court cases and that's what we sent off, over the weekend, to yourselves.

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VICE PRESIDENT ASBURY: So the Fitzgerald matter?

PN26

MR PETRESKI: Yes, that's correct.

PN27

VICE PRESIDENT ASBURY: Right.

PN28

MR PETRESKI: And stating that we have been at a disadvantage all this time by not having an opportunity to get our own lawyer.

PN29

VICE PRESIDENT ASBURY: But the respondent was never represented by an external lawyer in any of the proceedings before the Commission, at first instance. They were represented by internal counsel.

PN30

MR PETRESKI: Is that - - -

PN31

VICE PRESIDENT ASBURY: Well, I'm must wondering what - do you want to take us to something in - - -

PN32

MR PETRESKI: Well, if we were to be given an opportunity – well, anything in Mr Fitzgerald, yes, we have a couple of principles here that we could look at.

PN33

VICE PRESIDENT ASBURY: Right.

PN34

MR PETRESKI: Okay, so here, in recent case law, it says here, 'The recent decision in Fitzgerald - - -

PN35

VICE PRESIDENT ASBURY: Could you take us to a page, please?

PN36

MR PETRESKI: This is something we just downloaded from Keypoint Law, over the weekend. I can just read it to you if you like. It's the *Fitzgerald v Woolworths Limited* [2017] FWC 2797.

PN37

*As defined, representation before the Fair Work Commission in this matter, a Full Bench decision which was handed down at the end of last year, held that permission for lawyers and paid agents to represent a client in a matter extends to out of court activities, including preparing applications and making submissions.*

PN38

VICE PRESIDENT ASBURY: But in *Fitzgerald v Woolworths* the issue arose because Woolworths had not sought permission to be represented and they sought costs after the proceeding. In support of their costs application they put an invoice for external legal representation in circumstances where they hadn't been granted permission to have that representation. That was how the issue arose there.

PN39

MR PETRESKI: Okay.

PN40

VICE PRESIDENT ASBURY: Here there's no application for costs and there's no application seeking costs for external legal representation. If that occurs down the track, then an issue you can raise is that there was no permission granted for the respondent to be represented. Correct me if I'm wrong, but you knew the respondent was represented by a lawyer, but it's an internal lawyer.

PN41

MR PETRESKI: No. No, your Honour.

PN42

VICE PRESIDENT ASBURY: So you didn't know that - - -

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MR PETRESKI: No, we're not aware of that.

PN44

MR TYNAN-DAVEY: If it assists the Commission, our response to the initial unfair dismissal application notified that Minter Ellison assisted us with the filling out and our respondent submissions in that case. So the applicant has been aware about Minter Ellison assisting us, behind the scenes, for some time.

PN45

VICE PRESIDENT ASBURY: Okay. Well, I don't know what turns on it. You could have always sought legal representation if you wanted to have it.

PN46

MR PETRESKI: Okay. Well, that's what we were just following the Fair Work process in saying we were trying to do this as a self-represented party.

PN47

VICE PRESIDENT ASBURY: Yes, which you're perfectly entitled to do, or you would have been entitled to seek legal representation.

PN48

MR PETRESKI: Mm-hm.

PN49

VICE PRESIDENT ASBURY: As I understand it, *Fitzgerald v Woolworths* was about the fact that the respondent had a lawyer sitting in the hearing but not speaking.

PN50

MR PETRESKI: Yes.

PN51

VICE PRESIDENT ASBURY: And here I don't know that that occurred. Minter Ellison didn't sit in the hearing assisting, as I understand it, it was conducted by the respondent, with its own, internal - you're legally qualified?

PN52

MR TYNAN-DAVEY: Yes, that's correct. It was only myself and Mr Jansen present and also we had, obviously, Ms Adams, when she was required as a witness.

PN53

VICE PRESIDENT ASBURY: Yes. So a party doesn't require permission to be represented by a lawyer it employs in-house. So the fact that the respondent here employs lawyers in-house, it doesn't need permission for those lawyers to represent them and it would have needed permission if Minter Ellison were sitting in the hearing assisting. That's what Fitzgerald was about.

PN54

MR PETRESKI: Yes, sorry, that's just not how we read it, but that's fine.

PN55

VICE PRESIDENT ASBURY: Do you want to take me to a part where - - -

PN56

MR PETRESKI: It just says here that – we weren't aware - I mean we weren't aware that Minter Ellison was assisting the counsel. I mean if we'd known that, we could have got our own representation. The thing that we were just reading was saying that any, 'Including preparing any applications and making submissions'.

PN57

VICE PRESIDENT ASBURY: Right.

PN58

MR PETRESKI: And that in-house lawyers - part of the process was that in-house lawyers were only for other matters and not for representing in court. That's how we read the in-house lawyers, as part of the Fair Work Commission.

PN59

VICE PRESIDENT ASBURY: But if a party in a hearing, in the Fair Work Commission, has a person that works for them, who is employed and is a lawyer, that person can represent them in the Fair Work Commission, without seeking permission. They don't require permission.

PN60

MR PETRESKI: Okay.

PN61

VICE PRESIDENT ASBURY: It's only where – and in the case of, as I understand it, and if you want to take me to some part of the decision that says, 'This is not correct', what occurred was a lawyer sat in the proceedings, not speaking, but sat in the proceedings, as a shadow lawyer, and that was the issue that arose, because there was not permission granted.

PN62

In these proceedings no external lawyer sat in the proceedings assisting the respondent, it was conducted entirely, as I understand it, by its own employed, in-house counsel.

PN63

MR PETRESKI: It just states here:

PN64

*During the proceedings Mr Fitzgerald represented himself while Woolworths was represented by an internal employee relations specialist. However, Woolworths also engaged the services of the law firm which assisted with a number of background matters, including sending a without prejudice offer of settlement, on behalf of Woolworths, and having a legal representative sit next to the parties.*

PN65

That's the part that you mentioned. Yes, that's just not how we read it.

PN66

VICE PRESIDENT ASBURY: Okay. All right. So what do you wish us to do, as a result of your submission about *Fitzgerald v Woolworths* and the involvement of Minter Ellison? What is it that you're seeking?

PN67

MR PETRESKI: Well, just the fairness aspect of it all, Vice President. It's the fairness of it. If we had known that this was going to be going down Minter Ellison avenue, we could have also then engaged a lawyer and dealt with a lawyer.

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VICE PRESIDENT ASBURY: At first instance?

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MR PETRESKI: At first instance, yes.

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VICE PRESIDENT ASBURY: All right. So you say that had you been aware that Minter Ellison was preparing material and involved - - -

PN71

MR PETRESKI: Yes.

PN72

VICE PRESIDENT ASBURY: Well, what do you say about the proposition that you were aware because it was in the - in the respondent's form F3 that it - was it the form F3?

PN73

MR TYNAN-DAVEY: Yes, I'm just trying to find it now. Sorry, I misunderstood, it's not in the appeal book so I'm going through some emails just to get the exact - - -

PN74

MS BURNEIKIS: Vice President Asbury, am I allowed to speak?

PN75

VICE PRESIDENT ASBURY: Certainly.

PN76

MS BURNEIKIS: Thank you. We have the form F3, sort of piecing things together last night, so there was no employer representative listed at all, or a paid lawyer/agent, on their F3. The only name listed was Mr Jansen, so we didn't know at all until we kind of pieced together and worked out that NGS uses Minter Ellison and all the references on the bottom of the pages match up to something we found online that indicates it's Minter Ellison.

PN77

VICE PRESIDENT ASBURY: Right.

PN78

MR TYNAN-DAVEY: That's because we didn't have a paid agent or a solicitor at the time. It's, effectively, as Gordon Williams, partner at Minter Ellison, had actually put his name on that form F3. We're just trying to locate it now. Apologies we don't have it easily on hand. But it still stands correct that, yes, we didn't have a paid agent, we never sought to have a paid agent or external solicitor represent us at any of the hearings.

PN79

VICE PRESIDENT ASBURY: But in the background you had assistance from Minter Ellison?

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MR TYNAN-DAVEY: Yes, correct. We made no attempts to conceal that at all, yes. So Gordon Winters' name is on that document as my colleague has let me know.

PN81

VICE PRESIDENT ASBURY: What capacity was his name on the document as, if he wasn't – if he was an external lawyer, what was his capacity with signing the document in?

PN82

MR TYNAN-DAVEY: We're just going to confirm that.

PN83

VICE PRESIDENT ASBURY: Okay, thanks. So while we're looking for that, perhaps you can consider, for the appellant's perspective, what you should happen if that's the case? What - not yet, I want to - - -

PN84

MR PETRESKI: Sure.

PN85



VICE PRESIDENT ASBURY: - - - understand the basis of it, but, arguably, what do you say we should do because of that? Do you say we should quash the whole decision because they were represented, in the shadows, by a lawyer at first instance? Is that your submission?

PN86

MR PETRESKI: Ideally that would be the case. I mean I know it's quite difficult to - as a lay person coming into Fair Work we are trying to just abide by the rules and policies and procedures that we follow. We are both policy orientated people, we like process and policies and procedures. If we had been given notice that Minter Ellison was going to be acting on their behalf, in any capacity, then we would also have sought a lawyer.

PN87

For us the process was, the initial process, initial telephone hearing was difficult to - very difficult to understand exactly what that part of the procedure was and part of what we're saying is what is the process for a telephone appeals hearing? Sorry, what is the process for a telephone hearing? What is the process for a video conference hearing like we had, what do you call it, a directions with yourself. That made everything very clear.

PN88

So we've come into this open and honest, trying our best to fill in the forms, be on time with our paperwork and just take the matter as far as need be.

PN89

VICE PRESIDENT ASBURY: So when you say 'a telephone hearing', are you asserting that the first instance hearing before the Deputy President was conducted by telephone, or was it conducted by video?

PN90

MR PETRESKI: No, it was conducted by telephone. So that telephone process that was for the jurisdictional objection that it was a fair and just redundancy was not at all clear to what role we played in that. We assumed that that telephone conference would be about just the redundancy aspect of the case, not the whole case.

PN91

VICE PRESIDENT ASBURY: Well, it did determine the respondent's jurisdictional objection, as I understand it.

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MR PETRESKI: Yes, but - - -

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VICE PRESIDENT ASBURY: Because the respondent's jurisdictional objection was upheld, then your application was dismissed, your wife's application was dismissed.

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MR PETRESKI: Correct, yes. Had we have known that, at that point in time, that a telephone conference - I mean could we have had that conference then moved to a video conference? Could that have then been explained? Because from what we can read on the Fair Work website is that sometimes the jurisdictional objection is just that part of it. Sometimes it's together, where you have the jurisdictional objection and the unfair dismissal case heard at the same time.

PN95

VICE PRESIDENT ASBURY: Well, this wasn't. It was listed for jurisdiction only.

PN96

MR PETRESKI: Yes, and that's what we assumed that that was. So if we had got some legal advice at that stage, we would have known that this is what we should have gone down the path of, not - - -

PN97

VICE PRESIDENT ASBURY: But the matter was only listed for jurisdictional, to deal with the jurisdictional objection. If the jurisdictional objection had been rejected by the Deputy President you would have had another hearing, in relation to whether the dismissal was unfair.

PN98

MR PETRESKI: Yes.

PN99

VICE PRESIDENT ASBURY: So what error do you say – the Deputy President only determined the jurisdictional objection, as I understand it.

PN100

MR PETRESKI: Yes, that's all, but we didn't - we did not understand the process how that worked, in relation to the unfair dismissal. So we didn't understand that the whole - the whole thing hinged on just that aspect of the telephone conference. So if we'd have known that, then we could have modified our paperwork and cross-examined a lot better, if we'd have known how that actually worked, within the process.

PN101

VICE PRESIDENT ASBURY: But you did understand that this was to deal with a jurisdictional objection, on the basis that the respondent said that the applicant was not unfairly dismissed because her dismissal was a case of genuine redundancy, you did understand that?

PN102

MR PETRESKI: Yes.

PN103

VICE PRESIDENT ASBURY: So what unfairness arose, if you understood that was what the matter was dealing with?

PN104

MR PETRESKI: Not being able to find something in the process that we could understand better, and not having a directions hearing like yourself, we had on Friday, which was very clear to us. We didn't have a process that we could understand and follow, because it's quite difficult to follow that process through and understand that process on how that jurisdictional objection works in relation to an unfair dismissal.

PN105

VICE PRESIDENT ASBURY: But the Deputy President issued directions, on 3 July, that said the respondent had to go first, because it made the objection. So it had to file with the Commission, and serve on you, an outline of submissions, witness statements and documents in support of its jurisdictional objection and then you had to reply to that material and then the respondent got another reply. So you got the respondent's material first and from that material, surely - what do you say was confusing about that process?

PN106

MR PETRESKI: We understand that now. We understand, having gone through that process, we understand that that was our time to have everything heard and have questions asked at that particular time. But with just the telephone conference it was quite difficult to - quite difficult to just follow through on that process, just the flow through on that process was quite difficult for us to understand.

PN107

DEPUTY PRESIDENT GRAYSON: On the day?

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MR PETRESKI: On the day, yes. Because there was nothing prior and were just  
- - -

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DEPUTY PRESIDENT GRAYSON: So had you had a directions hearing at all prior?

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MR PETRESKI: No.

PN111

DEPUTY PRESIDENT GRAYSON: So that was the first appearance in the Commission?

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MR PETRESKI: Yes.

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VICE PRESIDENT ASBURY: So, essentially, your argument is that there was unfairness to you because the matter was conducted by telephone and you weren't aware of the nature of the proceedings?

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MR PETRESKI: Exactly, yes.

PN115

VICE PRESIDENT ASBURY: Have you raise that in your grounds of appeal?

PN116

MR PETRESKI: Not that particular aspect. We were going down - see, again, trying to follow the process, we were going down a different path which is, again we've had a directions hearing with yourself and now we understood how that appeal aspect worked, because we were going down a different avenue the way we read it so, no, we didn't do that at the time.

PN117

VICE PRESIDENT ASBURY: So, essentially, your view was that the appeal was going to be a hearing of the matter, with all witnesses and - - -

PN118

MR PETRESKI: No, no, no. Not essentially, no. The appeal was to have this matter, obviously like what we're going through now, to have it - have it heard and take it as far as possible for us.

PN119

VICE PRESIDENT ASBURY: So your grounds of appeal, the notice of appeal addresses matters relevant to the jurisdictional objection. So, essentially, in the grounds of appeal you say that there wasn't consultation, you challenge that the job really was gone.

PN120

MR PETRESKI: Yes.

PN121

VICE PRESIDENT ASBURY: You've raised those grounds of appeal and yet - so, clearly, they were the matters that the Deputy President considered at first instance - - -

PN122

MR PETRESKI: Yes.

PN123

VICE PRESIDENT ASBURY: - - - because you appealed his findings in relation to those matters.

PN124

MR PETRESKI: Correct. Reading through case law, that's how we understood it. We understood it that you could appeal and go down the path of this appeal. But, again, this being the first time that we appear before the court - - -

PN125

VICE PRESIDENT ASBURY: So now you say, essentially, that you want to add in an additional ground, which was the process was unfair because we didn't have an in person or a video hearing, we had a telephone - - -

PN126

MR PETRESKI: Not so much an in person hearing, your Honour, Vice President, it's more so the fact that we did not - the process wasn't very clear to us. The process wasn't made very clear from the - it might be clear to you as, you know, lawyers and solicitors, because you can understand that. But for us it was difficult to understand. We thought that we could appeal, based on the fact that the company has readvertised for someone to fulfil her role and not being able to question those witnesses and get a better path moving forward.

PN127

VICE PRESIDENT ASBURY: The role was filled, subsequent to the Deputy President handing down his decision, was it not?

PN128

MR PETRESKI: Yes. But I'm just saying, I'm explaining how we understood it, just how we understood the process.

PN129

VICE PRESIDENT ASBURY: But at the time the matter was heard, you had the witnesses there, before the Deputy President, and you had an opportunity to cross-examine them and question them about how they were going to do the work in future, what their process had been. You had that opportunity.

PN130

MR PETRESKI: But without a directions hearing, this is what we're trying to say, without a directions hearing we did not understand how that would work.

PN131

VICE PRESIDENT ASBURY: So you didn't - the proposition, for my part, that I'm struggling with a bit, is that you got the respondent's submissions first, which set out why they said this was a genuine redundancy.

PN132

MR PETRESKI: Yes.

PN133

VICE PRESIDENT ASBURY: And you had an opportunity to respond to them.

PN134

MR PETRESKI: Yes, we had all the questions out ready to go. We had all those questions all sorted out and ready to go. But we only assumed, or wrongly thought that that was just for the jurisdictional objection to the role, not the unfair dismissal aspect of the role. We kind of thought there was two separate issues.

PN135

VICE PRESIDENT ASBURY: But there would have only been a separate issue if you succeeded in - - -

PN136

MR PETRESKI: We understand that now, yes.

PN137

VICE PRESIDENT ASBURY: - - - challenging the jurisdictional objection. So you had all your questions ready to go - - -

PN138

MR PETRESKI: We did.

PN139

VICE PRESIDENT ASBURY: - - - to challenge the jurisdictional objection. So why didn't you ask them at the hearing?

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MR PETRESKI: We did not understand that process, to be honest with you, Vice President.

PN141

VICE PRESIDENT ASBURY: Well, why did you bring all your questions to the hearing and not ask them?

PN142

MR PETRESKI: Again, we didn't understand the process. We did not understand that was the process to then go through that whole - the whole thing that we had already outlined.

PN143

VICE PRESIDENT ASBURY: So you got the respondent's material, no question about that. You got their outline of submissions.

PN144

MR PETRESKI: Yes.

PN145

VICE PRESIDENT ASBURY: You knew they were going to turn up and say the job was gone, We were outsourcing it, we were doing whatever we were going to do, you knew they were going to say that. You knew they were going to say we didn't have to consult because there wasn't award coverage, but we did anyway, so you knew that.

PN146

MR PETRESKI: We did know that. We do understand that now, yes.

PN147

VICE PRESIDENT ASBURY: But I don't understand it - - -

PN148

MR PETRESKI: At the time - at the time - yes.

PN149

VICE PRESIDENT ASBURY: - - - then.

PN150

MR PETRESKI: We didn't understand that at the time. I'll be honest with your Honour, we did not understand that at the time Vice President, we did not understand that at the time.

PN151

VICE PRESIDENT ASBURY: So when the respondent filed all its material, what did you think you were coming here to do? (Indistinct).

PN152

MR PETRESKI: We thought we were going to appear in court and do exactly what we're doing now. That was our understanding of how that process worked.

PN153

VICE PRESIDENT ASBURY: Then what did you think the hearing before the Deputy President was?

PN154

MR PETRESKI: Just some questions about the jurisdictional objection. It was just a few basic questions about what the jurisdictional objection was going to be about and not about questioning witnesses and going through the process, like we are now. That's how we understood it.

PN155

VICE PRESIDENT ASBURY: Right.

PN156

MR PETRESKI: I mean I know it sounds a bit silly, but that's how we read it.

PN157

VICE PRESIDENT ASBURY: Okay. So where do you say there was - to succeed with an appeal against an unfair dismissal you have to show that there was an error. There was an error in the approach that the Deputy President followed, or there was an error in the facts that he found, and it was a significant error so that the outcome of the decision is doubtful, because the factual error was so significant. So as I explained the other day, something - if you say something happened on Thursday and he found it happened on Friday, and he still found the same thing happened, then that's not a significant error, that's just a factual error that doesn't change the outcome. But if he found something happened and the evidence showed, clearly, that it didn't happen, that may be a significant factual error that would have affected the outcome.

PN158

So you need either an error of that kind or an error in the approach the Deputy President took to dealing with the entire matter. So what do you say the error is?

PN159

MR PETRESKI: Okay. Well, for us, the error lies in the process of how this is set out for us to follow. Now, that was our understanding. So we're saying that the error is what is the process to follow? Why is it just a telephone conference, why is it sometimes a videoconference? Why are the two combined? Why is

there only one? Being not lawyers, we have a lot of difficulty trying to understand which is the process that we follow.

PN160

So you say that we had all their paperwork, which we did, and we had all the paperwork sorted out and ready to go, that was fine on our behalf, but we didn't understand that the process is that this telephone hearing is the process in this instance, rather than it's another process at another time or - is it - the question for us is, is it discretionary how the processes are run? Is it videoconferencing, is it in person conference, is it a telephone conference, is it - - -

PN161

VICE PRESIDENT ASBURY: Well, again, it's not a matter for us to really answer questions. The issue is, you were all ready to go and you came to a hearing and accepting the hearing was by telephone, you were all ready to go, you had all the material, you had your questions, why didn't you go and run your case?

PN162

MR PETRESKI: Sorry, Vice President, we were not aware that that is how that worked, that part of that is how that worked, that's how it should have worked. We are aware now. You can always find, in hindsight, it's easy to follow when you've been through that. But until you've been through that process - - -

PN163

VICE PRESIDENT ASBURY: But what did you think you were there for, at the telephone hearing?

PN164

MR PETRESKI: My wife, she actually did the speaking. In hindsight probably I should have done that, but we just thought we were there to answer a few questions for Boyce DP to understand the jurisdictional objection. That was all we understood it to be. That's how we understood it to be. That's all we understood. We didn't understand that that part of it is, that's the case, its time to go.

PN165

DEPUTY PRESIDENT GRAYSON: You didn't understand that the hearing was to determine the jurisdictional objection. You thought there was going to be some other - - -

PN166

MR PETRESKI: Yes, I thought we were just move on from that, here's a few questions that they had and then we were going to move on and go to the next one. That's how we thought - that's how we understood the process to be. Because it was only called the jurisdictional objection, so when we read through the Fair Work site it says, 'Some are combined, some are not combined'.

PN167

VICE PRESIDENT ASBURY: Well, this made clear it wasn't combined. The directions said, 'It's listed for jurisdictional hearing only'. That's what the



direction said. So that was clearly not combined, it was only going to deal with the jurisdictional objection.

PN168

MR PETRESKI: I understand that now. We understand that now, yes.

PN169

VICE PRESIDENT ASBURY: Well, did you query the process? Did you ask? Did you send an email saying, 'We don't understand the process'.

PN170

MR PETRESKI: It was only actually when we went through the process that we realised at the end, we just didn't understand how this was working, how this was operating, how it was unfolding. We just couldn't - we couldn't then question it because we didn't - I mean I know it sounds a bit silly, but that's how we understood it to be.

PN171

VICE PRESIDENT ASBURY: Okay.

PN172

MS BURNEIKIS: Vice President Asbury, we did email - I did email Associate Affick(?), got some links to the Fair Work website, but it still, reading the links, it didn't make a lot of sense. We basically were - we thought we'd ask some questions in relation to my role and that would go through and then we'd be bringing forth some witnesses for an unfair dismissal case.

PN173

Basically, on 12 July we also requested two witnesses from Mr Tynan-Davey, well, from Mr Jansen and that's when Mr Tynan-Davey commenced correspondence, on behalf of the respondent and he said, 'We respectfully confirm that we will not be providing the witness statements as requested'. At that stage I didn't realise I could use that form, as I used last week, to subpoena, I guess, a witness to attend. It was a very short timeframe, just a few days before the hearing.

PN174

VICE PRESIDENT ASBURY: So who did you want to have attend?

PN175

MS BURNEIKIS: My direct report manager, Ms Veronica Phillips(?), she wasn't aware of the redundancy. That's what she told me when I had a meeting with her, after the meeting with Mr Jansen and Ms Adams, who was one manager above me. And Ms Natalie Previterra, who was the acting CEO at the time, because my evidence was based on the altercation between her and I, after the cyber attack, which she - - -

PN176

VICE PRESIDENT ASBURY: Okay. What would you have done differently, if - I mean the bottom line is, from where I'm sitting, you got directions, they said, 'We're dealing with the jurisdictional objection only'. You got the respondent's

submissions that set out what they were saying and you needed to respond to them. So what different response would you have provided?

PN177

MR PETRESKI: This response I would have been speaking on Ms Burneikis' behalf. I would have asked if we could have either an in person hearing or a videoconference hearing, rather than just a telephone conference hearing, which was difficult to ask questions, difficult to gauge people, how they are, how they're talking. It was just not made clear to us that this is how - we just assumed that that was how the process was, you don't - it's just a telephone conference, it moves on to a different type of conference later on. That's how we understood it - that's how we understood the process.

PN178

VICE PRESIDENT ASBURY: Okay. Well, have you looked at the transcript that was provided?

PN179

MR PETRESKI: Yes.

PN180

VICE PRESIDENT ASBURY: Can you take us to any part of that which shows your misunderstanding?

PN181

MR PETRESKI: Yes.

PN182

VICE PRESIDENT ASBURY: Because it seems, again, that witness statements were admitted. Ms Burneikis cross-examined the witnesses, asked who the ultimately decision maker was, had an opportunity to cross-examine those witnesses and then to provide her own evidence.

PN183

MR PETRESKI: Again, we can't do that, Vice President, because, like I say, I'm sorry to reiterate, that we just did not understand that part of the process. We did not understand that this is how it worked, this is what you needed to do. The cross-examination needed to be a thorough one. We just did not understand that part of it. It may sound - - -

PN184

VICE PRESIDENT ASBURY: No, I'm just trying to understand, what would you have asked that you didn't ask in that hearing?

PN185

MR PETRESKI: We have a thousand questions. We have a thousand questions that we could have asked, in relation to Ms Burneikis' role within the company, statements made by certain people within the company about what her role was.

PN186

VICE PRESIDENT ASBURY: Okay. Ultimately, what is Ms Burneikis seeking out of this exercise?

PN187

MR PETRESKI: We've said all along, reinstatement.

PN188

VICE PRESIDENT ASBURY: Notwithstanding that the job - the respondent says there's no job to reinstate her to?

PN189

MR PETRESKI: If that's what they say, yes. But you can see that there's been advertising for someone else to fulfil part of that role. They've stated here - they've stated here, in one of the witness statements here, they've stated here that Ms Burneikis was doing office clean ups and social events and we could have asked and pushed forward on that point of it, so they could prove what social events Ms Burneikis was doing. What office clean ups was she doing at home, when she was working three days a week from home? What was she doing at home? You know, simply having said that her role had diminished, Mr Jansen has said that he has not had prior conversations with Ms Burneikis.

PN190

DEPUTY PRESIDENT BINET: So the key part of the case, by the employer, was that her actual position, so the job role, not specifically what she was doing day-to-day, but the requirement of having a graphic designer, as opposed to a social media type person, that role had changed. The business made a choice to move from a - I'm not in the industry so I don't know what the correct language is, but from a paper based to an internet based, or social media based system.

PN191

The case law says that if the business can, or the legislation says, the business can choose how it wants to operate its business, whether it wants to be paper based or web based. So the business says, 'We decided we're going to go from paper to web based', so that role, that position of being a paper based person no longer exists and that they then told your wife that that was the decision the business had made and asked her, or let her know and asked if there was anything she wanted to say about that.

PN192

Then they also have an obligation, under the legislation to look for other jobs. They say they couldn't find any, at the time she was dismissed. So they're the three parts of the case, in effect.

PN193

So is there something that you would have said or done differently that would address those things? So this argument that she was doing other things, that factually doesn't affect the three key parts that have to be established.

PN194

MR PETRESKI: Sure.

PN195

DEPUTY PRESIDENT BINET: So if the business says they've changed the operational requirement, that's a matter of fact, they have or they haven't. Then they either told her or didn't tell her and then they either have a job or they don't have a job.

PN196

MR PETRESKI: Yes.

PN197

DEPUTY PRESIDENT BINET: Now, I think there's some evidence that you were saying that several months afterwards there looked like a job that might be something that your wife had some skillsets for. The test is made at the time she's dismissed, not weeks or months later. So the evidence which you seem to raise in appeal, from what I've seen so far, doesn't really go to those three aspects, which are the key parts of the legislative requirements. Does that make sense?

PN198

MR PETRESKI: Yes, it does, and that's what we could have brought up at a hearing, that Ms Burneikis is the only one doing that type of work. She's the only one who has an Adobe Reader on her computer, so she's the only one doing Adobe work.

PN199

If you go to the appeals book, at the back of the appeals book, this is something we were going to highlight in the case, all of that green work, that says 'NGS in-house', is all of my wife's work, day-to-day work. That's everything that she does and it's not just paper, it is actually digital as well.

PN200

DEPUTY PRESIDENT BINET: I don't think there's any argument that you wife wasn't doing work, the argument is, the business decided they wanted to create a different role. So a business might decide they want an electrician instead of a plumber, so the plumber goes and they get an electrician and the argument is that they're two very different functions. It wasn't an argument that she wasn't doing any role and valuable work, but the business decided they wanted a different type of role.

PN201

MR PETRESKI: Yes. That role would have been in addition to her role, because I was a member of NGS Super and at NGS Super you have the option to either remain paper or go to digital. You don't automatically get put over to a digital – same as your bill from Telstra, same as your bill from the water company. If you don't want it digital it remains in a paper form.

PN202

VICE PRESIDENT ASBURY: But the respondent says, what it decided to do was outsource that work. The Commission doesn't sit here and say 'Well, if it was my company I wouldn't have done that. I would have kept it in-house because I wanted to keep employing Ms Burneikis'. The company is entitled to say, 'We don't want to employ someone full-time, part-time or any time, to do that work,

we're going to contract it out'. When they do, the work's still being done by someone, but it's not a job in the company. It's not a collection of tasks in the company. A job is a collection of tasks and the company is entitled to say, 'We don't want to employ a person to do that job, we want to outsource it'. And, as I understand it, that's what the company is saying here. So once it makes that decision, the Commission doesn't say, 'Well, we don't think that's a good decision'.

PN203

MR PETRESKI: No, but then what we were arguing was that on the day of the decision by Mr Boyce they advertised for a role that Ms Burneikis had previously performed. She just didn't do paperwork, there was aspects of her role that were web based, Facebook. Perhaps Vilija can explain a little bit better than I can.

PN204

VICE PRESIDENT ASBURY: So they advertised for a role, on the day of Ms Burneikis being dismissed?

PN205

MR PETRESKI: No, on the day of the decision by Mr Boyce, is that correct?

PN206

MS BURNEIKIS: In the morning, before the decision was handed down. The decision came through at 3 o'clock.

PN207

VICE PRESIDENT ASBURY: I don't accept that a company could possibly know when a member of the Commission is going to hand down one of their decisions.

PN208

MR PETRESKI: It was just seemed coincidental to us, that's all. Yes, that's fine.

PN209

VICE PRESIDENT ASBURY: Okay. So the applicant was dismissed in what month, March, or May?

PN210

MS BURNEIKIS: Middle of May, 15 May.

PN211

VICE PRESIDENT ASBURY: Middle of May, and the decision was handed down?

PN212

MS BURNEIKIS: 25 August.

PN213

VICE PRESIDENT ASBURY: Okay. So between the dismissal and the decision being handed down, the company decided to advertise a job that Ms Burneikis says she could have done, or done part of?

PN214

MR PETRESKI: That she was going part of, yes. That she was doing, yes.

PN215

VICE PRESIDENT ASBURY: She was doing part of? Okay. So it made another decision to have a different job. So it's not exactly the same job as Ms Burneikis did. So if you succeed your argument will be, even if the job's gone, she should have that job.

PN216

MR PETRESKI: Okay. In saying that - - -

PN217

VICE PRESIDENT ASBURY: But is that your argument?

PN218

MR PETRESKI: Yes, because the beauty of - the beauty of social media, LinkedIn and stuff, the person who is now doing that role is a graphics designer. So we're just adding two and two and going it does equal four.

PN219

VICE PRESIDENT ASBURY: But this is all - what you want to do is overturn this decision so you can argue that a job that was established some months after the event should be a basis for Ms Burneikis to be reinstated?

PN220

MR PETRESKI: Yes.

PN221

VICE PRESIDENT ASBURY: Okay, I understand. Is there anything else you wanted to say?

PN222

MR PETRESKI: No, thank you.

PN223

VICE PRESIDENT ASBURY: Ms Burneikis?

PN224

MS BURNEIKIS: May I just say, with the F3 form that Mr Jansen emailed doesn't have anything about Minter Ellison Solicitors, any external solicitors. At the same time there was an independent investigation going on, using Minter Ellison, an investigator appointed by Minter Ellison, for a complaint that I made. So that's - - -

PN225

VICE PRESIDENT ASBURY: Was there evidence about that before the Deputy President?

PN226

MS BURNEIKIS: No, because we were holding that for an unfair dismissal hearing, with the witnesses that we requested that were denied, basically.

PN227

VICE PRESIDENT ASBURY: Right.

PN228

DEPUTY PRESIDENT GRAYSON: The witnesses that were requested, they're not ones that actually statements were put on but they're others that you thought that might be relevant, is that right?

PN229

MR PETRESKI: Yes.

PN230

DEPUTY PRESIDENT GRAYSON: So it wasn't that they weren't available for cross-examination, having put on a statement? It's not that situation, is that right?

PN231

MR PETRESKI: Yes. So we would have requested that Vilija's direct line support, Ms Veronica Phillips, would attend the hearing and testify to what Vilija was doing all day and what her role was. It wasn't just one specific aspect, Vilija's role had always changed, throughout the years of her working there.

PN232

VICE PRESIDENT ASBURY: But that was a matter relevant to the jurisdictional objection, so why didn't you just ask questions of the witnesses about that?

PN233

MR PETRESKI: We understand that now, Vice President.

PN234

VICE PRESIDENT ASBURY: Okay.

PN235

DEPUTY PRESIDENT GRAYSON: If I could just ask a question?

PN236

MR PETRESKI: Sure.

PN237

DEPUTY PRESIDENT GRAYSON: Can I take you to page 63 of the appeal book?

PN238

MR PETRESKI: Yes.

PN239

DEPUTY PRESIDENT GRAYSON: I just want to check a submission that you made earlier, in terms of the legal representation. If I could take you to paragraph 1?

PN240

MR PETRESKI: Yes.

PN241

DEPUTY PRESIDENT GRAYSON: So I'm just checking, you were aware, indeed, that you could have a lawyer?

PN242

MR PETRESKI: Yes, we are now, yes. Yes.

PN243

DEPUTY PRESIDENT GRAYSON: No, this was sent to you on 3 July. Did you receive - - -

PN244

MR PETRESKI: Yes, yes. What I'm saying to you, yes, we understand now that if we'd have known that NGS would have had their lawyers, we also would have engaged a lawyer as well.

PN245

DEPUTY PRESIDENT GRAYSON: My question is, were you aware that you could have a lawyer?

PN246

MR PETRESKI: We were aware that you could have a lawyer, but then - - -

PN247

DEPUTY PRESIDENT GRAYSON: So my question is, were you aware that you could have a lawyer, and I think you've said, 'Yes'. But you chose not to have one because you weren't aware that the respondent was represented - - -

PN248

MR PETRESKI: Yes. Correct, yes.

PN249

DEPUTY PRESIDENT GRAYSON: - - - or seeking support?

PN250

MR PETRESKI: Yes. Correct, yes.

PN251

DEPUTY PRESIDENT GRAYSON: That's what I understood. Because I thought, earlier, you'd said that you - - -

PN252

MR PETRESKI: If we'd known that Mr Tynan-Daley was actually a solicitor, we would have - - -

PN253

MR TYNAN-DAVEY: Tynan-Davey, sorry.

PN254

MR PETRESKI: Sorry. If we'd have known that, we also would have sought some legal representation.



PN255

VICE PRESIDENT ASBURY: The matters that you're raising, in relation to, you know, Ms Burneikis, the respondent saying that Ms Burneikis was filling her day with administrative tasks, et cetera, that was all squarely put in Ms Adams' witness statement before Boyce DP.

PN256

MR PETRESKI: Yes.

PN257

VICE PRESIDENT ASBURY: Ms Adams was there giving evidence and you were asked, as I understand it, 'Is there anything you want to cross-examine Ms Adams about, in relation to her evidence?'. So I don't understand how you would not have noted, at that point, that that was your opportunity to cross-examine Ms Adams?

PN258

MR PETRESKI: Again, Vice President, not having been through this before, we were not aware how that would have worked. We simply just don't understand how that process worked.

PN259

MS BURNEIKIS: I also thought that without having my manager as a witness, how would they quantify that they were looking at my role, over a period of February, when I just returned from annual leave, into February, it was a short month, and no one ever sat with me and asked me what I do in my role. They didn't even know where my files were saved, you know, when they requested the hard drive, everything is on the shared drive, so they spent money then to recreate files. So no one – no one, except for, I guess, my direct report manager, would have known what I was doing.

PN260

DEPUTY PRESIDENT GRAYSON: Did you ask questions of the witnesses about their knowledge, or lack of knowledge, in the hearing below?

PN261

MR PETRESKI: Yes, we asked Mr Jansen a question and he said he had no prior meetings with Ms Burneikis.

PN262

VICE PRESIDENT ASBURY: But looking at the transcript, Ms Burneikis was cross-examining Ms Adams about whether the company had had an agency on retainer, or it's always had parts of its design function outsourced. There was opportunity to cross-examine on the basis of the statement.

PN263

MR PETRESKI: Yes. Correct, yes, we agree with you. I agree with you but, again, we just didn't understand how that actually worked, without having a prior, say, directions hearing on how this would work. This is a telephone conference, we just - - -

PN264

DEPUTY PRESIDENT BINET: If a decision was made higher up in the organisation, you know, the head office has a look and says, 'Right, they're things we can outsource, we can get those commercially, we don't have to have someone in-house', it could, potentially, be the case that your wife's supervisor didn't - had no say.

PN265

MR PETRESKI: Possibly, yes.

PN266

DEPUTY PRESIDENT BINET: What is it that makes you convinced that the decision was made, other than that way?

PN267

MR PETRESKI: Well, the fact that she works from home three days a week with me, she's always working, she always seems to be busy at something.

PN268

VICE PRESIDENT ASBURY: That's not a question about whether she's working or not, it's a question of the decision might be made at a higher level, regardless of what she's doing. They're looking at a spreadsheet and they say, 'Here's a service that could be outsourced', could that have happened at a higher level than her supervisor?

PN269

MR PETRESKI: Well, if we'd had the opportunity to properly hear some of these matters we would have raised the issue where Ms Burneikis was - had an incident involving the acting CEO, and we think that was the catalyst for her termination. Because she has 18 years unblemished record, that certainly has to account for something.

PN270

VICE PRESIDENT ASBURY: The point of a redundancy is not that the person's record or conduct is unsatisfactory, it's because the company has made a decision that they no longer require the job to be done and parts of the job might still be done, but it's not the job, and if they outsource significant parts of it, the job's gone.

PN271

MR PETRESKI: I understand.

PN272

MS BURNEIKIS: The graphic design work has always been outsourced to some capacity. Like one person - when I started at the company I was the fifth employee, now it's 16, I believe. One graphic designer can't possibly manage all that work. I was already overloaded and my direct report manager, Ms Phillips, indicated that she'd be getting me help. So in light of that, it just doesn't make sense, and a lot of the work I was doing was for the strategy team, which is regulatory disclosure documents.

PN273

VICE PRESIDENT ASBURY: It mightn't make sense to you, but that's not the issue. The company has the - it's their business, they have the right to decide who does the work and who doesn't do the work.

PN274

MS BURNEIKIS: Okay.

PN275

VICE PRESIDENT ASBURY: So they decide to outsource the work. The fact that you were doing some of it and you already had some help from outsourcing doesn't stop them from saying, 'We now want to outsource the lot'. That's what they say has occurred, as I understand it. That the graphic design work has been outsourced.

PN276

MS BURNEIKIS: But they stated, in witness statements, including digital, everything.

PN277

VICE PRESIDENT ASBURY: Yes, and now they've brought some of that back, months after the event.

PN278

MS BURNEIKIS: And they'll bring back the graphic design, because they were going through a brand refresh, with the agency that we've been working on, Dave Clark, for a brand refresh, so some files I've packaged and I've sent to them because they would then prepare the new look and feel and then they'd come back in-house for me to maintain and work on and update, as required, for, you know, any significant product disclosure, rollover change, or - if that makes sense.

PN279

VICE PRESIDENT ASBURY: But you're asking us to assume that if you don't - if you don't succeed with this appeal or that somewhere down the track the company's is going to bring your previous graphic design role back in-house, which it's got every right to do, down the track if it decides to do that. But it doesn't mean that at the time it made the decision to outsource that the job wasn't redundant.

PN280

Anyway, I understand your submissions. Is there anything else you want to say?

PN281

MR PETRESKI: No, thank you.

PN282

VICE PRESIDENT ASBURY: Thanks.

PN283

For the respondent?

PN284

MR TYNAN-DAVEY: Thank you. I'd just like to clarify that we have got to the bottom of the F3 matter and we can confirm and do offer our apologies for misleading. Mr Gordon Williams wasn't on that, it was actually Mr Jansen, my colleague. So we apologise for misleading the Commission.

PN285

DEPUTY PRESIDENT GRAYSON: So based upon that, the Deputy President wasn't aware that you were getting legal assistance?

PN286

MR TYNAN-DAVEY: Correct. Needless to say, I think our position is, is that Ms Burneikis had ample opportunity to obtain legal advice on this matter. We had multiple junctures at which that could have occurred. Also, the statement that it was unknown that I was even a solicitor was incorrect. Every role that I've held at the fund has either been a lawyer, senior lawyer, head of legal and governance. So there'd be no mistake, out of any of my involvement in this matter, that I was a solicitor or not. I've been involved since before the conciliation, between the conciliation and the hearing and, obviously, now.

PN287

No objection was raised during any of these times about my participation and no issues were raised, by Ms Burneikis or Mr Petreski, about any misunderstanding of the process. If anything, as they rightly alluded to, they requested for more witnesses to attend, so they knew that there was a requirement for witnesses to be at the hearing and to be cross-examined. So there was a whole list that they put to us, which we objected to, considering the time and also that we had put statements on for them. We thought it was irrelevant to the matters at hand.

PN288

But the crux of our response is that, firstly, we don't believe that there's any additional evidence required. I know that Ms Burneikis had put some on but considering that requires leave, we didn't put any on in response. But if the Commission does, indeed, wish to take that into account we'd like some time to respond to that.

PN289

I need to say, I think there's enough information here to – so whether there's permission to appeal or not, whether it's in the public interest to do so or if there's a significant error fact. On both cases we don't believe it's either in the public interest or there's a significant error of fact that the Deputy President made the right decision. If anything, it showed that we consulted when there wasn't, necessarily, a requirement to consult, but we did so anyway, obviously trying to offer what we could to Ms Burneikis about the process.

PN290

VICE PRESIDENT ASBURY: Thank you.

PN291

MR PETRESKI: May I just add, Vice President, that in the F3 form it says here Luke Jansen was the contact person, it doesn't say Mr Davey was going to be the contact person, at any point in time. I would ask my wife, please, that if she had

any prior knowledge to Mr Davey being a solicitor, as his email signature says, Brendon Tynan-Davey, sorry, head of legal and governance, it doesn't say he's a solicitor. It doesn't say anything about him being a solicitor anywhere. It's only that we came across it on a LinkedIn search, so that's incorrect that Ms Burneikis knows that he's a solicitor. He doesn't introduce himself as a solicitor. I don't introduce myself as a Sydney Water employee.

PN292

VICE PRESIDENT ASBURY: So your point is, if you'd known the respondent -  
- -

PN293

MR PETRESKI: Yes, absolutely.

PN294

VICE PRESIDENT ASBURY: - - - had in-house lawyers, that you would have obtained a lawyer.

PN295

MR PETRESKI: Yes, absolutely. Yes. If, like they've stated here in the F3 form, that - it quite clearly states here, 'Provide representatives details below. No, go to question 1', that's it, supplied here in the F3 form, by Mr Jansen.

PN296

VICE PRESIDENT ASBURY: Because they're not required to, if it's an internal lawyer. If they're being represented by an internal lawyer, they're not required to provide information about their representative. It's only if there's an external lawyer that's going to be representing them in the proceedings. So you knew today that there was going to be – that this issue had arisen, so you didn't act on that today and seek to get legal representation?

PN297

MR PETRESKI: No, no. We did this all over the weekend, so not today. So it was all over the weekend.

PN298

VICE PRESIDENT ASBURY: All right. Is there anything else you wanted to say?

PN299

MR PETRESKI: No, thank you.

PN300

VICE PRESIDENT ASBURY: All right.

PN301

If there are no further submissions then we will indicate that we will reserve our decision and we will issue it in due course. Thank you.

**ADJOURNED INDEFINITELY**

**[3.04 PM]**